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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-74

PIPEFITTERS LOCAL UNION NO. 562, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

**BRIEF FOR THE AMICI CURIAE IN SUPPORT OF THE
PETITIONERS**

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INTEREST OF THE AMICI CURIAE

For the first time in the long history of the criminal prohibition of political contributions and expenditures by certain enumerated groups, the Court has before it a case in which there has actually been a conviction for violation of the prohibition. Called into question in

this case is the meaning and constitutionality of Title 18 U.S.C. § 610. The brief of the amici in this case is filed pursuant to written consent of both the petitioners and the government.

The amici curiae are officers of a major international labor organization, the United Mine Workers of America, which numbers a membership of two hundred thousand. W. A. Boyle is the President and John Owens is the Secretary-Treasurer. The amici curiae presently stand under indictment in the United States District Court for the District of Columbia in one count for allegedly conspiring to violate Title 18 U.S.C. § 610 and in eleven counts for violation of Title 18 U.S.C. § 610 and in a thirteenth count there is an allegation of violation of Title 29 U.S.C. § 501(c). The latter is predicated on the same facts as alleged to support the violation of Title 18 U.S.C. § 610.

The allegations made by the government against the individual petitioners in this case are, in effect, almost identical to those made against the amici curiae, and all of the constitutional questions posed by the petitioners in the course of their defense have been raised by the amici curiae in the United States District Court for the District of Columbia in their own defense. It follows that the resolution of those questions may be dispositive of the action now pending against the amici curiae.

This brief urges the Court not to omit consideration of three issues in reaching its conclusion in this case. They are:

1. The expenditure provision of Section 610 is unconstitutional and the contribution provision of the

same statute is inseparable from the expenditure provision and, therefore, it, too, is unconstitutional and must fall.

2. The Congress never intended by Section 610 to prohibit indirect contributions or expenditures by labor organizations.

3. This statute has been intentionally enforced in a discriminatory fashion and the individual petitioners are in the class arbitrarily, though intentionally, selected by the government against whom this statute would be enforced by the government to the exclusion of others.

ARGUMENT

INTRODUCTION

The legal issues before the Court spring from a factual setting in which the individual petitioners are accused of conspiracy to consent to the making by a labor organization of political contributions in connection with federal elections. The *sine qua non* of the alleged crime is the individual petitioners' status as labor union officers and their conspiracy to consent while acting in their respective labor organization capacities. Thus, if the petitioners agreed to consent to political contributions while in roles other than their roles as labor organization officers, the offense alleged is illusory.¹

¹ Officers of national banks and corporations are also by the express language of the statute prohibited from consenting to political contributions in federal elections.

TITLE 18 U.S.C. § 610'S BAN ON UNION POLITICAL "CONTRIBUTIONS" IS NOT SEPARABLE FROM ITS UNCONSTITUTIONAL PROHIBITION OF UNION POLITICAL "EXPENDITURES"

This portion of the argument will first assume *arguendo* that there is sufficient evidence to justify a finding that the individual petitioners conspired to consent to a "contribution" constituting a violation of Section 610. Further, it is assumed *arguendo* that Congress has the power under the Constitution to prohibit associations of workingmen through their officers from making political "contributions" in connection with federal elections. Accepting these premises, it is nonetheless maintained: (1) the companion prohibition in Section 610 against an "expenditure" by labor unions in connection with federal elections is unconstitutional; (2) the two prohibitions in Section 610, the one banning "contributions" and the one outlawing "expenditures", are not separable; that is, Congress did not intend that one ban remain in force should the other be held unconstitutional; and (3) the petitioners, even though arguably not charged with violating the "expenditure" provision, are entitled to challenge its constitutionality, since the effect of such a successful challenge would render inoperative the "contribution" provision.

A. The Doctrine of Separability

Petitioners rest the second and third points of this argument upon the principle of statutory construction known as the doctrine of separability or severability. Mr. Justice Brandeis summarized this doctrine as follows:

A statute bad in part is not necessarily void in its entirety. Provisions within the legislative

power may stand if separable from the bad. But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it; and that the legislature intended the provision to stand, in case others included in the act and held bad should fall. *Dorchy v. Kansas*, 264 U.S. 286, 289-90 (1924)

Section 610 by its terms prohibits a labor union from making either "a contribution or expenditure" in connection with a federal election. Absorbing the provisions of this statute into the Brandeis formulation of the doctrine of separability to this statute, one reaches the following conclusion: Section 610, if bad in part, i.e., with respect to its ban on union political "expenditures" during federal elections, is not necessarily void in its entirety. The provision in Section 610 against a union political "contribution", if itself within the legislative power, may stand if separable from the bad. But the provision against "contributions", even if inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it; and that the legislature intended the provision against "contributions" to stand, in case the "expenditure" provision in the statute be held bad and thereby fall.

B. Standing To Attack Constitutionality of Expenditure Ban

Since the petitioners are charged with a conspiracy in violation of the "contribution" provision, and since that prohibition is coupled with the ban on "expenditures" in a single statute, they have standing to challenge the constitutionality of the "expenditure" provision provided they can establish that Congress did not intend the "contribution" prohibition to survive

the death of its statutory companion. The petitioners have such standing because if indeed the "expenditure" ban is both unconstitutional and inseparable from the "contribution" provision, then the prohibition on political "contributions" is a nullity, and the petitioners are not to be prosecuted for conspiring to consent to such contributions.

[T]he principle that the constitutionality of an act may not be raised by one not affected by the invalid part does not apply when the entire act, by which he is affected, is rendered unconstitutional by reason of the part which is void. *McFarland v. City of Cheyenne*, 48 Wyo. 86, 42 P.2d 413, 416 (1935).

That one making a separability argument has standing to bring into question provisions of a statute other than those being applied to him was recognized by this Court in *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210 (1932). The statute there in question created a commission with authority to regulate both the *amount* of crude oil produced from wells, and the *price* to be charged for the oil. A refiner resisted the order on the ground that the provisions as to *price* regulation were unconstitutional and not separable from the provisions regulating the *amount* of production. The Court rejected his argument not because he lacked standing to make it, but because upon careful examination of the purposes animating the statute, it was able to conclude that the price-fixing regulations, even if they should prove to be unconstitutional, were separable from the part of the statute that was being applied to the refining company. This ruling implies a recognition on the part of the Court that the refining company did have standing to raise

the issues of the constitutionality and the separability of portions of the statute not actually being applied to it in the particular case. By the same token, it is now submitted that there is in this case standing to challenge the constitutionality of the "expenditure" prohibition in Section 610 provided it can be demonstrated that this provision is not separable from the ban on "contributions".

C. Effect of Separability Clause

One who attacks the validity of a statutory provision by arguments based on the doctrine of separability must dispose of two threshold considerations: (a) Does the statute contain a separability clause, *i.e.*, a provision that if one part of the statute is declared invalid, the remaining provisions shall not be affected by such holding? (b) What is the impact of the presence or the absence of such a clause upon the applicability of the doctrine to that statute? First, we attend to these preliminary questions.

Section 610, as it now reads, was enacted as part of the Labor Management Relations Act of 1947, the so-called Taft-Hartley Act. Section 503 of that Act provides as follows:

SEPARABILITY.—If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Notwithstanding the seemingly absolute language of this separability clause, it is very well settled that

neither the presence nor the absence of such a clause is determinative as to the separability issue. In this connection, it is helpful to take note of the observations of a leading authority in the area of statutory construction concerning the impact of a separability clause in cases where part of a statute has been invalidated:

In the preparing of statutes it is considered good draftsmanship to include in each bill a separability clause Because of the very frequency of its presence, the separability clause is regarded as little more than a mere formality. A few courts are derisive: "the act in question contains a saving clause, which it seems customary nowadays to insert in all legislation with the apparent hope that it may work some not quite understood magic."

. . . The authority of the court to eliminate invalid elements of an act and yet sustain the valid elements is not derived from legislature, but rather flows from powers inherent in the judiciary. Thus to say that a saving clause is "indisputable evidence" of legislative intent to pass part of an act irrespective of void provisions is to put too great an emphasis on the mechanical inclusions of such provisions within an enactment. Separability clauses should be given reasonable consideration, but should not, at least under present usage, be paid undue homage. 2 Sutherland, *Statutory Construction* § 2408 [3rd Ed. 1943].

On the contrary, as recently as 1968, this Court remarked that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 510, 585 n. 27 (1968). The presence of such a clause simply places upon one claiming that the provisions of the statute are not separable the burden of demonstrating that he is correct. For example, in *Dorchy v.*

Kansas, 264 U.S. 286 (1924), the Kansas statute before the Court contained a separability clause more strongly worded than the one in the Taft-Hartley Act:

If any section or provision of this act shall be found invalid by any court, it shall be *conclusively* presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court. *Id.* at 290 n. 2 (Emphasis added).

Nevertheless, Mr. Justice Brandeis observed that the separability clause merely "provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command." *Ibid.*

Later, in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Court had before it a challenge to a federal statute which established a plan for fixing prices and wages in the coal mining industry. Having first ruled that the price-regulation provisions in the statute were unconstitutional, the Court was faced with the question of deciding whether the provisions regulating wages were separable. The statute contained a separability clause which is virtually identical to the one in the Taft-Hartley Act:

If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby. *Id.* at 312.

The Court held that this clause did not determine the issue of separability, but simply had the effect of plac-

ing on one attacking the statute the burden of showing the inseparability of the provisions involved:

In the absence of such a provision, the presumption is that the Legislature intends an act to be effective as an entirety—that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it. The effect of the statute is to reverse this presumption in favor of inseparability, and create the opposite one of separability. Under the nonstatutory rule, the burden is upon the supporter of the legislation to show the separability of the provisions involved. Under the statutory rule, the burden is shifted to the assailant to show their inseparability. But under either rule, the determination, in the end, is reached by applying the same test—namely, What was the intent of the lawmakers? *Ibid.*

In that case, the Court held, the separability clause to the contrary notwithstanding, that the provisions regulating *wages* were not separable from the provisions regulating *prices*, and that, therefore, a declaration of the unconstitutionality of the *price* provisions had the side-effect of rendering invalid the *wage* provisions, even should those *wage* provisions be themselves free from any constitutional infirmity.

D. Inseparability of "Expenditure" and "Contribution" Prohibitions

Against the background of the Taft-Hartley Act's separability clause, and the burden which it places upon the petitioners, we now proceed to demonstrate the inseparability of Section 610's provision outlawing union political "contributions" from that proscribing union political "expenditures." One preliminary observa-

tion is appropriate in embarking on this course: Section 610 is a criminal statute. Courts have been noticeably more reluctant to hold provisions severable when they appear in a penal statute than they are to reach such a result when the same provisions appear in a civil statute.

In keeping with the principle of statutory construction that criminal statutes will be strictly construed against the state, penal statutes will be more often struck down for partial invalidity than purely civil enactments, even though the same rules of construction are followed in handling both types of legislation. Sutherland, *Statutory Construction* § 2418 (3d Ed. 1943)

The test for resolving the question of the separability *vel non* of these two statutory terms is to suppose that while Section 610 was pending in Congress, an attempt to strike out the ban on union political "expenditures" had prevailed, and then to inquire whether in that event, the conclusion can be justified that Congress, notwithstanding, probably would have enacted the ban on union "contributions" alone. This is the approach to the issue of severability recommended by this Court in *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936). It is submitted that an examination of the internal structure of the statute; the definitions assigned by Congress to the two terms under consideration; the purpose of the legislation itself; and the legislative history of Section 610 compels the conclusion that the ban on union political "contributions or expenditures" is a unit proposition; that, in other words, these twin provisions are "like the interwoven threads constituting the warp and woof of a fabric, one . . . of which cannot be removed without fatal con-

sequence to the whole." *Carter v. Carter Coal Co.*, *supra*, at 315-16.

E. Structure of Statute Indicates Inseparability

First, we advert to the internal structure of the statute itself. It will immediately be noted that the ban on contributions is not found in one section of the Taft-Hartley Act, with the prohibition on expenditures being in another. Nor do we find within Section 610 the two prohibitions being placed in separate subdivisions. Instead, the proscription of "contributions" is separated from that on "expenditures" by but a single word. It is not suggested, of course, that the failure of Congress to place these two provisions in separate sections or in separate subdivisions points inexorably to the conclusion that they are inseparable. On the other hand, we do insist that it is one pertinent factor working in favor of the contention that the terms are closely integrated.

F. Language of Statute Indicates Inseparability

Second, we look at the meaning which Congress itself assigned to these two words in order to see what light that congressional meaning casts on the extent to which the legislators themselves thought that the conduct they were aiming at was divisible. Each of these terms is defined in Title 18 U.S.C. § 591. The term "contribution" is defined as follows:

[A] *gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise or agreement to make a contribution, whether or not legally enforceable.* (Emphasis added).

The term "expenditure" receives the following definition:

[A] payment, distribution, *loan, advance, deposit or gift, of money, or anything of value, and includes a contract, promise or agreement to make an expenditure, whether or not legally enforceable.* (Emphasis added).

One has only to read these two definitions to see that they overlap almost to the point of congruency. The only item present in the definition of the term "contribution" that is not duplicated in the definition of "expenditure" is "subscription". The only items present in the definition of the term "expenditure" not duplicated in the definition of "contribution" are payment" and "distribution". Approached another way, one who makes a "gift" of money or anything of value in connection with a federal election can be said to have made both a "contribution" and an "expenditure". One who makes a "loan" of money or anything of value in connection with a federal election can be said to have made both a "contribution" and an "expenditure". One who makes an "advance" of money or anything of value can be said to have made both a "contribution" and an "expenditure". One who makes a "deposit" of money or anything of value will be making at one instant both a "contribution" and an "expenditure". Finally, one who makes a "contract, promise or agreement" to make either a gift or a loan or an advance or a deposit of money or anything of value will find himself within both the definition of "contribution" and the definition of "expenditure." Under the circumstances, it is evident that the Congress itself regarded these terms as having a heavy degree of overlap, and for a court to undertake to separate them is in light of the statutory definition to

embark upon an effort to unscramble two scrambled eggs. As one writer put it in a thoughtful law journal comment:

[18 U.S.C. § 591] defines 'contribution' and 'expenditure' in such a way as to make differentiation almost impossible. Both expenditures and contributions are referred to as gifts, loans, advances, deposits of money or value, and contracts, promises or agreements to make them. The only word exclusively characterizing a "contribution" is "subscription"; the exclusive words for "expenditure" are "payment" and "distribution". Comment, *Section 304—Taft-Hartley Act: Validity of Restrictions on Union Political Activity*. 57 Yale L.J. 806, 812 n. 22 (1948)

G. The Legislative History of the Statute Indicates Inseparability

The conclusion that the prohibition of the union political "contribution" is statutorily inseparable from that on union political "expenditures" is reinforced by an examination of the legislative history pertaining to Section 610. Although the ban on political contributions by corporations had been in force since 1907, it was not until 1943, with the passage of the War Labor Disputes Act (popularly known as the Smith-Connally Act) that the prohibition was extended to contributions by labor unions. [57 Stat. 163, 167-8 (1943)]. Two scholars, who have studied the legislative history of the Smith-Connally Act have noted that the inclusion in it of a prohibition against union political contributions was in the nature of a last-minute insertion which received only the most cursory legislative consideration:

The circumstances under which the limitation upon trade union contributions was included in this Act are discouragingly reminiscent of the in-

clusion of campaign fund ceilings in the Hatch Act. Again, the provisions were not germane to the main purpose of the bill which purportedly at least, was an emergency measure aimed to prevent strikes in wartime

Considering the complexity of the problems involved and the heat and confusion attending the passage of the Smith-Connally Act, it is not surprising that this particular provision should not have been singled out for special consideration. When the Senate bill came to the House, Representative Harness moved an amendment which was in effect a substitute bill. The provision dealing with trade union contributions was included therein. Lost in a bewildering array of amendments to the amendment, some of which passed and some of which were defeated, few members had a very clear idea of what was and was not in the bill when it came to a vote The provision affecting political contributions was included in the Conference Committee report without supporting argument or explanation. Overacker, *Presidential Campaign Funds* 55-57.-(1943).

During House deliberations upon this measure [the Smith-Connally Act] which had already passed to the Senate, Representative Harness, of Indiana, offered a substitute for the bill as reported from committee, one feature of which was a proposal to add "labor organizations" to the section of the Federal Corrupt Practices Act of 1925 prohibiting political contributions by corporations. The Harness substitute, with this feature included, was accepted by the House and by the joint conference committee to which the bill was then referred. Kallenbach, *The Taft-Hartley Act and Union Political Contributions Expenditures*, 33 Minn. L.R. 14-15 (1948).

The entire Smith-Connally Act, including this ban on labor contributions, was limited to expire six months

after a presidential declaration that World War II had terminated. Accordingly, the 1943 prohibition on labor union contributions obviously did not involve any decision on the part of Congress that such contributions should be permanently barred. Indeed, the fair conclusion to be drawn from the legislative history at this point is that in 1943, without any hearings or committee consideration directed to the subject, the House hastily adopted, and the Senate acquiesced in, a temporary ban on political contributions as part of a package of wartime curbs on labor unions. Certainly there is nothing in the background of the 1943 prohibition which reveals a legislative intent that union political contributions be permanently barred.

The temporary ban in 1943 on labor union political contributions, coupled with the presidential election held the following year, provided Congress with an opportunity to observe just how effective such a legislative approach was likely to be in accomplishing the purposes behind the statute. The Senate created the "Special Committee to Investigate Campaign Expenditures in 1944." This Committee found that labor organizations, while adhering strictly to the letter of the prohibition against political "contributions", were nonetheless spending large sums of union money for the purpose of influencing federal elections. The committee noted that the C.I.O. had advised its member unions as follows concerning the reach of the new prohibition on union contributions:

Counsel advises us that the law does not prohibit a labor organization . . . from spending moneys in connection with its own activities, undertaken for the purpose of advancing the cause of one or more candidates for Federal Office, provided that

this money is spent directly by a labor organization and not pursuant to an agreement or pre-arrangement with these candidates, their political activities or committees. Thus, the [C.I.O.-P.A.C.] is prohibited from making any contribution to a candidate for a federal office or to his political party or political committee, to be used to forward his candidacy. The Committee may, however, continue to engage in its general political and educational activity and, through the distribution of leaflets, the holding of meetings of members of organized labor and the general public, the use of radio time, etc., forward the candidacy of such persons as it may endorse for Federal Office. Quoted in Senate Report No. 101, 79th Cong., 1st Sess., p. 22.

The majority of the Special Committee made the following non-committal comment about the practice of labor unions making expenditures instead of contributions during the federal elections:

The special committee found no clear-cut violation of the Corrupt Practices Act on the part of the [C.I.O.-P.A.C.] Inquiry into the affairs of the Political Action Committee emphasized *two outstanding facts which enabled the committee to function within the law; namely, (1) The Federal Corrupt Practices Act by expressed limitation, has no application to primary elections; (2) section 313 of the Corrupt Practices Act prohibits a labor union or a corporation from making a "contribution" in connection with a Federal election, but it does not extend the ban to "expenditures".* Id. at 23. (Emphasis added).

Two members of the committee, in a minority comment, took the position that the failure of the statute to prohibit "expenditures" as well as "contributions"

had created a loophole which largely frustrated the purpose of the statute:

Senators Ball and Ferguson, believing that use of union funds to support a particular candidate or course of political action is wrong in that it opens the way for the use of money paid in by individuals for political action which they, as a minority would oppose, believe *the Federal law should be clarified so that the prohibition on use of such union funds would apply to primary elections and political conventions and to expenditures as well as contributions by unions.* Id at 24. (Emphasis added).

The House of Representatives also created a special committee to investigate campaign expenditures, this committee focusing on those made during the congressional election of 1946. It too found that the prohibition on contributions was easily circumvented.

There is evidence before the committee that *some organizations which are prohibited from making contributions in a political campaign have made expenditures and have engaged in activities the purpose of which were to endeavor to influence the election or defeat of candidates.*

It is noted that *the act prohibits contributions and does not expressly prohibit expenditures.* It is reported to the committee that a former Attorney General had issued a ruling to the effect that the activities above-mentioned do not constitute the making of contributions. It is conceivable that *the word "contribution" might imply a giving on one hand and accepting on the other; yet from the study of the history of this provision of the act, the committee feels that the activities hereinabove referred to, which are carried on on an extensive scale, constitute violations of the spirit and intent*

of the act. House Report No. 2739, 19th Cong. 2d Sess., p. 39-40. (Emphasis added).

The special committee then made an observation which is very pertinent to determining whether Congress would intend that the ban on contributions stand in the event expenditures were not and could not be prohibited:

The intent and purpose of the provision of the act prohibiting any corporation or labor organization making any contribution in connection with any election would be wholly defeated if it were assumed that the term "making any contribution" related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would the law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf? Id. at 40. (Emphasis added).

At the same time, the Special Committee to Investigate Senatorial Campaign Expenditures 1946 was making similar observations and recommendations:

Section 313 of the Federal Corrupt Practices Act of 1925 as amended applied only to "contributions". Experience has shown that some corporations and labor unions have spent money directly on behalf of a political party or candidate and that the applicability of the prohibition upon contributions has in consequence been denied. . . . [S]pecific extension of the prohibition to include a prohibition upon "expenditures" will plug the existing loophole whereby corporations, national banks, and labor organizations are enabled to avoid the obviously intended restrictive policy of the statute by garbing their financial assistance in the form of an "expenditure" rather than a contribution. Senate

Report No. 1, Part 2, 80th Cong., 1st Sess., p. 38-39. (Emphasis added).

It seems quite plain from a reading of the foregoing excerpts from the reports of the various congressional committees which examined the efficacy of the ban on labor political contributions that the statute was regarded as ineffective unless and until it could be broadened to prohibit corporate and labor political expenditures as well.

H. The Purposes of the Statute Indicate Inseparability

A consideration of the goals which Congress sought to achieve by Section 610 confirms that the twin bans on contributions and expenditures are too closely linked to survive a severance.

It is generally conceded that the initial ban on union political contributions was designed to serve two purposes. First, Congress sought to eliminate the extent to which corporations and labor unions could use their large financial resources to influence the outcome of federal elections. Second, Congress was concerned for those shareholders and union members who saw the general treasury of these organizations, to which they had contributed and in which they had a financial stake, being depleted for the purpose of promoting political candidates, issues, ideas and programs with which these minority members did not agree.

It was felt that the influence which labor unions exercised over elections through monetary expenditures should be minimized, and that it was unfair to individual union members to permit the union leadership to make contributions from general union funds to a political party which the individual member might oppose. *United States v. C.I.O.*, 335 U.S. 106, 115 (1948).

A ban on union political contributions which is not coupled with a parallel ban on union political expenditures serves little or no purpose in accomplishing either of these twin legislative goals.

As far as the undue influence which labor unions might exert upon the outcome of federal elections by use of their large financial resources, such influence is hardly minimized by a statute which prohibits a union from contributing the \$5,000 maximum which others are allowed to contribute to a political candidate (see Title 18 U.S.C. § 608); and at the same time leaves the union free to spend hundreds of thousands of dollars to purchase advertising space in the various media to promote the election of that same candidate.

By the same token, the purpose of protecting minority members of a union from having its resources used to promote political candidates and programs with which they do not agree is hardly served by requiring the union, instead of giving a candidate a certain sum of money to purchase advertising space, to purchase that advertising space itself to promote the very same candidacy, and thereby to associate even more directly and dramatically the union itself with the candidate and his programs.

As noted earlier, in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Supreme Court suggested the following test for determining the separability of provisions of the statute, one of which had been held unconstitutional: if when the statute was pending before Congress an attempt to strike from the bill the provision now ruled to be constitutionally infirm had been made and carried, would Congress have proceeded to enact the remainder of the statute? The legislative history leading up to Section 610 demonstrates beyond

question that Congress looked upon the ban on union political contributions standing alone as ineffective to achieve its legislative purposes. With this in mind, is it not probable that had Congress realized that the ban on expenditures, which it deemed necessary to plug the loopholes in the existing law, would itself be unconstitutional, it would then have explored other and quite different legislative avenues for achieving its purposes? For example, with respect to the goal of reducing the influence of the union and corporate money upon federal elections, Congress might have given very serious consideration to tightening up the prohibition in Section 608 (itself already applicable to the unions and corporations) placing a \$5,000 ceiling on contributions, while at the same time requiring some form of pre-election disclosure of any large contributions made to a candidate during the course of his campaign for federal office.

With respect to the congressional concern for dissident union members, Congress might have considered a statute along the lines of that in force in Great Britain, which both requires that unions spend money for political purposes only when a majority of the union members so authorize and, at the same time, permits any individual union member to "contract out", i.e., exempt himself from financial support of his union's political endeavors by filing a written notice. See *Regulation of Labor's Political Contributions and Expenditures: the British and American Experience*, 19 U. Chi. L.R. 371, 381-84 (1952).

It is, of course, difficult to divine at this distance in time just what course Congress would have traveled in 1947 if it had realized that a ban on labor's political expenditures would run afoul of the Constitution. It

is possible (although a fair reading of the legislative history makes it seem improbable) that Congress would nonetheless have made permanent the temporary, and easily evaded, wartime ban on union contributions. On the other hand, it seems much more likely that Congress would have given careful consideration to a pattern of statutes which would have effectuated its concern to curb the undue influence of union funds on elections and at the same time protect minority members from coerced financing of political views contrary to their own. This sort of uncertainty as to Congress' intent is precisely the occasion for use of the doctrine of inseparability. By ruling that there is a vital link between Congress' desire to prohibit union contributions and its desire to prohibit union expenditures; and by declaring that the unconstitutionality of the latter effectively annuls the adoption of the former, this Court would be rendering a decision that would both permit and promote a highly desirable reconsideration of labor's role in federal elections by a Congress now operating with more guidance with respect to the permissible area of regulation left open to it by the Constitution.

I. "Expenditure" Ban in Section 610 Is Unconstitutional

Having demonstrated that the ban in Section 610 upon union political contributions is inseparable from that on union political expenditures, it remains to be established that the latter prohibition is unconstitutional. In *United States v. U.A.W.*, 352 U.S. 567 (1957), the Supreme Court ruled that the expenditure provision of Section 610 would be violated by the action of a labor union in purchasing television time for the purpose of advocating the election of a particular candidate to federal office. However, a ma-

jority of the Court expressly declined to rule upon whether the statute, so construed, violated the guaranties of free speech and assembly protected by the First Amendment. *Id.* at 589-93. Three members of the Court, Chief Justice Warren and Justices Black and Douglas, felt that the constitutional issue was ripe for decision, and they took the position that a statute which prohibited a union from expending money in order to express its views concerning a candidate for federal elective office was an unconstitutional abridgement of the rights of free speech and assembly. *Id.* at 593-98.

Although the decision in the *U.A.W.* case left open the constitutional question, it did make clear that Section 610 did impose restraints upon the expression of political opinion by labor unions. In other words, the unions are not to expend any money whatsoever where their primary purpose is to speak to the public at large about organized labor's views on political issues and candidates. Does Congress have power under our Constitution so to restrict associations of laboring men from addressing the public?

The decisions of the United States Supreme Court in area of the First Amendment guarantees have always recognized a very special status for speech which expresses political views. In *Stromberg v. California*, 283 U.S. 359, 369 (1931), the Court stated:

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. (Emphasis added).

This same view was reiterated in *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937):

[T]he more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for *free political discussion*, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. (Emphasis added).

James Madison, a few years after the beginnings of our government, stressed the importance of guarding against any legislation which "is levelled against *that right of freely examining public character and measures, and of freely communicating thereon*, which has ever been justly deemed the only effectual guardian of every other right." IV Elliot, Debates on the Adoption of the Federal Constitution 561. (Emphasis added).

Because of this great concern for preserving freedom of political expression, any statute which restricts that freedom should receive the utmost scrutiny by the courts.

In every case, therefore, where legislative abridgment of the [First Amendment] rights is asserted, the courts should be astute to examine the effects of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. *Schneider v. New Jersey*, 308 U.S. 147, 161.

The prohibition on union political expenditures, as construed by the Supreme Court in the *U.A.W.* case, prohibits payments by unions to television stations, radio stations, newspapers and magazines to disseminate a labor union's views on political candidates and issues. Moreover, the statute would appear to interdict all other expenditures of a political nature by a union, such as those for holding public gatherings in support of a candidate, getting out the vote for a particular candidate, printing and distributing placards and campaign literature and purchasing billboard space. Yet each of these activities engaged in by anyone constitutes an exercise of speech; some of these activities employ the press; and all of them, when utilized by a group of organized workingmen involves a form of assembly. None of these activities can be carried on in a meaningful way without some expenditure. Therefore, the statute is nothing more or less than a prohibition on workers assembling, speaking and publishing their political views concerning issues and candidates during federal elections. Not only does this statute curtail the political rights of workingmen gathered together in a union, but also it impairs the correlative rights of their fellow citizens, the general public, to hear and be informed about the position of organized labor with respect to these candidates and issues. The statute then dramatically poses the question of whether workingmen have a constitutional right to act *through their labor unions* in the political field to protect their collective rights. Congress evidently thinks not, even though it must recognize that the choice of candidates at any particular federal election may well determine whether the rights and interests of laboring men will be secure or will be destroyed.

As the Petitioners brief to the Court of Appeals pointed out, a candidate may favor the repeal of the Taft-Hartley Act; the Landrum-Griffin Act; and the outlawing of Right-to-Work laws. The same candidate may favor a higher minimum wage and a law forbidding discrimination in employment. If he does, associations of businessmen are free to spend money to bring about the defeat of the candidate. This is as it should be! On the other hand, associations of workingmen may not spend a single penny to express their support of this candidate. This is neither as it should be, nor as it may constitutionally be!

Another candidate may favor applying the anti-trust laws to unions; the enactment of a Federal Right-to-Work statute; as well as added restrictions on labor's political activities. Again, associations of business and professional men are free to spend money to elect such a candidate, whereas a labor union may be guilty of a felony if it spends a single penny to express the collective opposition of the majority of its members to the election of such a candidate. To state the situation is to condemn it from a constitutional standpoint.

A mere recital of the types of activities which Section 610 prohibits should be sufficient to alert anyone concerned with the civil liberties of free speech, free press and free assembly to the unconstitutionality of the statute. The very idea that a union commits a felony by purchasing television time to inform the public of its position with respect to a particular candidate; or the notion that a union violates the law when during the course of a federal election campaign it purchases advertising space to indicate its endorsement or disapproval of a particular candidate

—each reveals that Section 610 involves precisely the kind of muzzling of political views which the First Amendment rights are designed to prevent.

A quick review of some of the statutes which the Supreme Court has held violative of First Amendment rights establishes *a fortiori* the unconstitutionality of the restraint on speech involved in Section 610. For example, it is unconstitutional for a state to impose a licensing tax on the privilege of engaging in the business of selling advertising where a newspaper or magazine has a weekly circulation of more than 20,000 copies. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). It is unconstitutional for a city to prohibit the distribution of literature without permission from the City Manager. *Lovell v. Griffin*, 303 U.S. 444 (1938). It is unconstitutional for a city to prohibit a person distributing handbills and similar literature from ringing the doorbell or otherwise summoning a resident to the door. *Martin v. Struthers*, 319 U.S. 141 (1943). It is unconstitutional for a state to require labor union organizers to register with its Secretary of State and to secure an organizer's card before soliciting members within the state. *Thomas v. Collins*, 323 U.S. 516 (1945).

If the above restraints on political expression run afoul of the Constitution, it would certainly seem that a statute which prevents a labor union from using its financial resources to enable large numbers of people to hear its message of opposition to or support for a candidate for a federal elective office cannot survive constitutional scrutiny. Here Congress has undertaken to prohibit totally the expression of political views in pending elections by all the great labor unions of the land. In one legislative stroke the

primary organized representatives of millions of laboring men and their families are denied the power of persuasion in the protection of their own interests and those of their members.

The Supreme Court has been at great pains to protect, and properly so, the right to express extremist political views by those on the lunatic fringes of our society. The First Amendment is a hollow collection of guarantees, indeed, if it means that only speech which no one is likely to pay attention to is constitutionally protected; if speech which is likely to be effectual, which is likely to persuade people to the viewpoint it espouses, may be absolutely prohibited. If *organized persuasion at polling time*, and this is really what is involved with union political expenditures, is indeed a political practice that can be made felonious, then the historic decisions of the Supreme Court in the First Amendment area have served to make it not a great bastion which preserves our institutions, but merely a haven for socially doubtful and politically ineffective thoughts and expressions.

Efforts to save Section 610 from constitutional attack generally take the approach that the First Amendment rights are not absolute and that they must be balanced against other equally legitimate governmental concerns. Certainly, however, one who takes this tack should be required to justify a proscription of political expression by the very clearest showing of the need for the particular legislation. This simply is not possible as far as Section 610 is concerned. One of the concerns which is attributed to Congress by the enactment of the ban on labor union political expenditures is the desire to keep federal elections free from undue influence on the part of labor organi-

zations. The problem with this argument is that no evidence has been or can be adduced to show that labor unions have in fact spent a disproportionately high amount in connection with elections. On the contrary, labor's expenditures run far below its proportionate share based on voting population. This very point appears from the congressional investigations preceding enactment of Section 610. In the reports of the four Congressional committees between 1944 and 1947 which studied union political expenditures there is neither a single word nor suggestion of *disproportionate* or *undue* union expenditure or influence. (S. Rep. No. 101, 79th Cong., 1st Sess.; H. Rep. 2093, 78th Cong. 2d Sess.; S. Rep. No. 1, Pt. 2, 80th Cong., 1st Sess.; H. Rep. No. 2739, 79th Cong., 2d Sess.) Far from indicating undue influence, the committee reports prior to 1947 actually indicate the contrary: that labor organizations enjoy disproportionately little financial influence on federal elections. For example, the Green Committee which studied expenditures in connection with the 1944 elections, found that labor's expenditures accounted for only 7% of the total political expenditures made during that year. At the same time, it discovered that sixty-four family groups made *direct* political contributions (which labor was prohibited from making and to all intents and purposes did not make) in an amount which was only \$325,000 less than the expenditures which labor had made on behalf of the many millions of workers comprising its membership. There is no showing, either legislative or otherwise, nor can there be, that labor unions were ever in a position to exercise disproportionate or undue influence on federal elections. On the contrary, labor's political expenditures run far below its proportionate share based on voting

population. This less-than-proportionate, rather than excessive, participation is hardly an evil requiring correction by a complete prohibition of labor union political activity. Indeed, true respect for our fundamental democratic processes would seem to require that labor union participation in political processes be encouraged rather than restricted.

The major justification for an enactment such as Section 610 is that the statute protects the minority of union members who might object to the support of a particular candidate and whose funds, in form of union dues, are being used for such support. It is submitted that this is not a sufficient justification for a statute of this type. First of all, labor union activity is of necessity group activity, and this requires some submersion of individual viewpoints to positions taken by the majority of the group. Labor unions are associations of individuals operating on the principle of majority rule. The Supreme Court has held that majority rule is "a rule that is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions." *N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324, 331 (1946). Over the past generation, the need for labor's participation in politics has been accentuated by the increased extent to which actions of government affect the economic life of every segment of the population. The same considerations which underlay the trade union movement, those realities which required helpless individuals to take concerted action against the powerful employer now require the individual venturing into the political arena to associate with others in order to achieve that representation and promote those political views which in turn protect his own

economic interest. Unions must act politically with their organized strength to insure that their views will receive an adequate hearing from the public and from those who make legislative and executive policy. In order to accomplish these goals, the labor union must be free to subordinate individual dissenting views of its members to the overall viewpoint of the union itself.

Moreover, even if it be conceded that the right of assemblies of workingmen to express their bloc political views must on balance yield to the desire of Congress both to preserve the federal elections from the influence of the large union financial resources and to protect individual dissenting members of the union from contributing indirectly to political causes with which they do not agree, this would not justify the blunderbuss type of prohibition one finds in Section 610. The Supreme Court has always insisted that legislation impinging on First Amendment rights must be narrowly drawn to deal with the precise evil which the legislature seeks to curb. *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504 (1952); *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. New Jersey*, 308 U.S. 147 (1939); *DeJonge v. Oregon*, 299 U.S. 353 (1937).

The broadside interdiction of political activity which Section 610 imposes cannot be said to be an appropriate manner in which to deal with the supposed evil of labor's political activities. If the evils at which Section 610 is aimed are those which have been suggested—undue influence of labor union money, impurity of elections, and disregard of minorities in the union—Section 610 on its face is simply not drawn with the narrowness required for it to pass muster

under the Constitution. This is true because it is a statute which *prohibits altogether, rather than regulates*. It is further true because it is a statute which *prohibits irrespective of the presence or absence of the evils* at which it is aimed. The statute applies even to those labor unions where there is complete unanimity with respect to political views. Moreover, the statute does not prohibit *large* expenditures of union money; it prohibits *any* expenditure of union money. It is very difficult to see how the expenditure of \$250 to purchase bumper stickers saying: "Re-elect Senator X—Labor's Friend" would bring about undue influencing of the particular election involved. Yet the willful expenditure of or conspiracy to expend \$250 to print and distribute such a bumper sticker would be a felony under Section 610.

As Justice Douglas put it in his dissent in the *U.A.W.* case:

When the exercise of First Amendment rights is tangled with conduct which government may regulate, we refuse to allow the First Amendment rights to be sacrificed merely because some evil may result. Our insistence is that the regulatory measure be 'narrowly drawn' to meet the evil that the government can control. . . . '[T]he legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.' 352 U.S. at 596-7

Justice Douglas went on to note that there are alternative methods available for protecting dissident or minority union members from seeing their dues used to promote political views with which they do not agree. These ways would not involve, as Section 610 does, prohibiting the majority members of the union from

using union funds to promote labor's candidates and issues. The defendant would conclude by echoing the view of the three justices in the *U.A.W.* case who reached the constitutional issue that Section 610, at least with respect to its expenditure prohibition, "is a broadside assault on the freedom of political expression guaranteed by the First Amendment." 352 U.S. at 598.

Since, as was demonstrated, this unconstitutional ban on expenditures cannot be separated from the companion prohibition on contributions, the latter should fall with the former. In this way, Congress, now aware that the Constitution protects the right of unions to expend money to express political views, can reassess the various constitutional ways by which any undue influence upon elections by labor unions can be prevented and rights of minority labor union members can be protected. It may very well be that when Congress realizes that unions are constitutionally entitled to make "expenditures" from their treasuries to promote the election of candidates, it will decide that there is no point in a statute prohibiting them from making a "contribution" to the election of a candidate. Congress might then explore other ways of preventing against the evil of undue labor union influence, such as tightening up the ceiling on such contributions and expenditures; and requiring extensive and immediate disclosure of all expenditures and contributions.

II.

"INDIRECT" CONTRIBUTIONS IN CONNECTION WITH A FEDERAL ELECTION, WHICH IS THE NATURE OF THE CONTRIBUTIONS ALLEGED IN THE INDICTMENT, ARE NOT WITHIN THE PURVIEW OF TITLE 18 U.S.C. § 610.

Even when one resolves all ambiguities in favor of the government, the indictment does not charge a conspiracy by the petitioners to make or consent to a "direct" contribution to any of the federal election campaigns enumerated. A conspiracy to consent to a direct contribution would involve the payment of money out of the general treasury of the Union to an individual or the campaign committee of some individual standing for federal office. The indictment in this case does not charge that type of contribution; on the contrary, the Government is at pains in the indictment to emphasize the indirect and circuitous nature of the method by which contributions were to be made.

Specifically, it is alleged that the petitioners established, not a union fund, but "a special fund entitled 'Pipefitters Voluntary, Political, Educational, Legislative, Charity and Defense Fund'", hereinafter "the Fund". It is also alleged that the Fund was administered by the individual petitioners. Sums donated by individuals, within and without the union membership, then reposed in the accounts of the Fund for an indefinite period of time and were from time to time drawn upon by checks payable to unspecified persons. The alleged contribution by the union to any individual campaign committee was at least a four-step procedure: funds passed (1) from the contributor to an agent for the Fund; (2) from the agent to an individual petitioner; (3) from a petitioner to

the Fund bank account; (4) from the Fund account to the particular campaign committee involved.

The circuitous route traveled by this money leads to the inquiry as to whether a contribution which is made in such a roundabout way is prohibited by the statute. The language of Section 610 which is pertinent to this inquiry is the following:

It is unlawful for . . . any labor organization to make a contribution or expenditure in connection with any [federal] election

Of course, if the statute read as follows: "It is unlawful for . . . any labor organization to make *directly or indirectly* a contribution or expenditure in connection with any [federal] election", there would be no question as to whether the statute covers situations where the money is routed through other organizations or individuals. For example, in *Judd v. Board of Education*, 278 N.Y. 200, 15 N.E. 2d 576 (1938), the Court of Appeals construed a statute which banned financial aid "directly or indirectly" to support parochial schools. It made the following comment concerning the effect of that phrase:

The wording of the mandate is broad. Aid or support to the school "directly or indirectly" is proscribed. The two words must have been used with some definite intent and purpose; otherwise, why were they used at all? Aid furnished "directly" would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked and without circumlocution or ambiguity. Aid furnished "indirectly" clearly embraces any contribution, to whomsoever made, circuitously, laterally, disguised, or otherwise, not in a straight, open and direct course for the open and avowed aid of the

school, that may be to the benefit of the institution or promotional of its interests and purposes. How could the people have expressed their purpose in the fundamental law in more apt, simple and all-embracing language? *Id.*

Since the conspiracy to violate Section 610 charged by the Government in the indictment in this case does not involve a conspiracy to make a "direct" contribution to any political campaign, and since the statute does not expressly ban "indirect" contributions, the Court is confronted with the problem of deciding whether the statute should be interpreted to embrace both types of contributions. It is submitted that every applicable principle of statutory construction calls for a negative answer to this question.

First of all, it is settled that penal statutes should be strictly construed and, especially where substantial rights are involved, be given any reasonable interpretation which favors the defendant. *C.I.R. v. Acker*, 361 U.S. 87 (1959); *Smith v. United States*, 360 U.S. 1 (1959); *F.C.C. v. American Broadcasting Company*, 347 U.S. 284 (1953). There is a strong policy against extending via interpretation the reach of a criminal statute:

Criminal statutes should be given the meaning their language most obviously invites. Their scope should not be extended to conduct not clearly within their terms. *United States v. Williams*, 341 U.S. 70 (1951).

Secondly, there is the principle that a statute, especially a criminal statute, where susceptible of two or more interpretations, should be given the interpretation which is the safer from a constitutional

standpoint. A criminal statute which is so vague and indefinite that it leaves one with reasonable doubts as to its applicability to his projected conduct is unconstitutional.

The rule that penal statutes are strictly construed establishes a requirement of definiteness which must be met by the legislative draftsmen. Thus, it is not uncommon to find penal statutes declared void for indefiniteness. The words of the criminal statute must be such as to leave no reasonable doubt as to the intention of the legislature, and where such doubt exists, the liberty of the citizen is favored. 3 Sutherland, *Statutory Construction* § 5605.

If Section 610 were intended by Congress to apply to both direct and indirect contributions, then it would seem that the language used is vague and indefinite, and, it would seem, inexcusably so, since the inclusion of the phrase "directly or indirectly" would have prevented any question about the matter.

Thirdly, if the statute were construed to reach indirect as well as direct political contributions, the process by which a court would arrive at such construction is more properly classified as one of interpolation, than of interpretation. In other words, a court would not be construing language in the statute; instead, it would be inserting language into the statute that is not there. As this Court expressed it:

[O]ur problem is to construe what Congress has written. After all, Congress expresses its purposes in words. It is for us to ascertain—neither to add nor subtract, neither to delete nor to distort. 62 *Cases of Jam v. United States*, 340 U.S. 593-596 (1951).

It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written. *United States v. Great Northern Railway*, 343 U.S. 562, 575 (1952).

Finally, and most importantly, reference to other statutes where Congress has prohibited the making of political contributions reveals that when Congress wishes to outlaw both direct and indirect contributions it says so in so many words. For example, in Title 18 U.S.C. § 608(a), the provision which creates the \$5000 limitation on political campaign contributions, the legislative intent is expressed as follows:

Whoever, *directly or indirectly*, makes contributions in an aggregate amount in excess of \$5000 during any calendar year, or in connection with any campaign or for nomination or election to or on behalf of any candidate for an elective Federal office . . . shall be fined not more than \$5000, or imprisoned not more than five years, or both.

In Title 18 U.S.C. § 607, the phrase "directly or indirectly" is also used in connection with political activities:

Whoever, being an officer, clerk, or other person in the service of the United States, or any department or agency thereof *directly or indirectly* gives or hands over to any other officer, clerk, or person in the service of the United States . . . any money or other valuable thing on account of or to be applied to the promotion of any political object, shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

We see then in Title 18 U.S.C. Sections 607, 608 and 610 three federal statutes regulating the making of political contributions. When two of them expressly

prohibit such contributions whether made "directly or indirectly," whereas the third, Section 610, does not contain that phrase, it seems apparent that the latter is intended to be a narrower statute than the first two. Moreover, the presence of the phrase "directly or indirectly" in Sections 607 and 608 shows that Congress was acutely aware of the problem of indirect contributions and knew how to deal with that problem when it wanted to do so. The failure to include that phrase in Section 610, when it had already been included in Sections 607 and 608, clearly indicates that Section 610 is not to be given a meaning which would reach the facts indicated in the indictment in this case. To give it such meaning in face of the language in these two companion statutes is tantamount to an amendment of Section 610 to include the three-word phrase "directly or indirectly" found in Sections 607 and 608.

Section 610 is a penal statute, and it hardly accords with the notion of strict construction to inject into that statute the very meaning which Congress has by the phrase "directly or indirectly" given to two companion statutes. Moreover, the presence of the phrase "directly or indirectly" in Section 607 and Section 608, coupled with the absence of that phrase from Section 610, lends a new dimension to the "void-for-vagueness" argument being made by the petitioners. One contrasting these three statutes, and noting the presence of the phrase "directly or indirectly" in two of them, and its omission from the third, would necessarily conclude that the breadth of that third statute is narrower than the other two statutes.

**UNCONSTITUTIONAL DISCRIMINATION IN THE
ENFORCEMENT OF TITLE 18 U.S.C. § 610**

This Court, as well as others, has held that the government, including the judicial branch, will not lend its powers to application of law in an unconstitutionally discriminatory fashion.

Application by the government of Title 18 U.S.C. § 610 has been and is arbitrary, capricious and shocking to the conscience, all in violation of due process and equal protection of the laws.

The government has no right to engage in discriminatory enforcement. In fact, it has an obligation of the highest order to refrain from unconstitutional discriminatory enforcement of our laws.

In view of the foregoing, this portion of the argument urges the Court to take judicial notice of the unconstitutional discrimination in the enforcement of Section 610. It is acknowledged that this question was not raised in the courts below. Notwithstanding, it is suggested that the powers of this Court will not be lent to sustaining unconstitutional government action regardless of the point in time at which the unconstitutional action is raised.

Nearly a century ago this Court discarded the view that defendants who claim unconstitutional discrimination need not be heard simply because they are defendants and that prosecutors are constitutionally unfettered in the exercise of their powers. The dictate of this Court could not be more clear than:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye

and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

No argument is here advanced that *all* crime need be prosecuted in order to prosecute *some* crime. That argument skirts the issue; it is not the thrust of our argument that discretion in prosecution of crime be abolished.

However, we do assert that discretion is not license and that the government is consciously engaged upon a course of heretofore unfettered unconstitutional selective enforcement of Section 610. The case before the Court is but another marker along that course.

Yick Wo, supra, involved the discriminatory enforcement of a San Francisco city ordinance against Chinese laundries and the resultant imprisonment of the Chinese proprietors. To that the Court's answer was:

[W]hatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. *Id.* at 373.

In *Yick Wo*, the arbitrariness lay in the unequal administration of the law against Chinese.

In another case challenging discriminatory enforcement of the West Virginia recidivist, or colloquially

the "three-time-loser" statute, the petitioner failed to show purposeful discrimination by the prosecution. In pointing out the petitioner's failure the Court said the records on other three-time offenders may not have been available to prosecutors until it was too late to prosecute them as repeaters. "Hence the allegations [of the petitioner] set out no more than a failure to prosecute others because of a lack of knowledge of their prior offenses." *Oyler v. Boles*, 368 U.S. 448, 456 (1961). While unsound factually, the Court still thought that further comment was warranted on the legal argument and added that:

[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. Therefore, grounds supporting a finding of denial of equal protection were not alleged. *Id.* at 456.

So, while negating the specific transgression, the Court recognized, again, the general requirement of prosecutorial due process and the possibility for prosecutorial abuse.

In *Washington v. United States*, 130 U.S. App. D.C. 374, 401 F.2d 915 (1968), an allegation of discriminatory enforcement was reviewed. The court found that there was a failure to make out a case of discrimination, but several observations relevant to the instant case were made.

First, the court recognized, as does this brief, the difference between discriminatory enforcement and the

right of the legislature to legislate or, as it were, regulate selectively, so long as the regulation is not disproportionate to the evil or danger sought to be eliminated.

Second, the concepts of equal protection and due process both stem from the American ideal of fairness and while the two are not always identical, unequal application of criminal laws or unequal protection is violative of due process.

Third, while not having to reach the point, the court said that it thought "prosecutors, like other governmental representatives, were constitutionally bound" to avoid intentional discrimination.

The admonition is not surprising for it is well settled that equal protection and due process as mandated by the Constitution apply to all agencies of government. *Shelly v. Kraemer*, 334 U.S. 1 (1947). It appears equally well settled that discriminatory enforcement is a good defense. *Two-Guys from Harrison-Allentown, Inc. v. McGinley, District Attorney*, 366 U.S. 582, 588 (1960); *People v. Utica Daw's Drug Co.*, 16 A.D. 2d 12, 225 N.Y.S. 2d 128 (1962), 4 ALR 3d 404 and Annotation therein.

In *Utica Daw's* the trial court, while recognizing the holding of *Yick Wo*, committed reversible error by submitting to the jury the question of unconstitutional discriminatory enforcement and refusing to hear evidence of illegal activity similar to that of the defendant which went unprosecuted. The defendant had maintained that its criminal prosecution for making illegal sales on Sunday was based on its being a "cut-rate" store and that non "cut-rate" stores, while committing the same violation, went unprosecuted. The

prosecutor in *Utica Daw's* conceded that if enforcement of the statute were discriminatory, then it would constitute a good defense.

The appellate court in *Utica Daw's* perceived the distinction between non-enforcement of the criminal law and unconstitutional discriminatory selective enforcement. However, on appeal it was held that non-enforcement is relevant evidence bearing upon the contention of unconstitutional discrimination in the enforcement. Discriminatory enforcement abrogating constitutional rights, as it obviously always does, will not, the court said, be aided by the courts which are themselves agencies of government. See, *Chicago, B. & O. R.R. Co. v. Chicago*, 166 U.S. 226, 233-34 (1897).

The New York court said that the question (which answers itself) was whether public authorities should be allowed "sporadically to select a single defendant or a single class of defendants for prosecution because of personal animosity or some other illegitimate reason." *People v. Utica Daw's Drug Co., supra*, 225 N.Y.S. 2d at 133.

Surely, sporadic enforcement for illegitimate reason is a thundering issue in the instant case. If there be any doubt of that, resolution is found in the studied course of the prosecution of labor leaders, and the government's benign attitude toward other known offenders of the same statute. There is no rational basis for the disparate treatment. Unprosecuted charges of violation by others are found in the very indictments under which labor union officers are prosecuted.

To document the foregoing one need look only to the indictments themselves. In the case before the

Court, it is alleged that a number of political contributions were made by issuance of checks: Yet, there has been no indictment of any of the "acceptors" or "recipients". In fact, in other cases the "recipients" or "acceptors" are actually identified by name in the indictment. See, e.g., *United States v. Seafarers International Union of North America, Gulf; Lakes and Inland Waters District, AFL-CIO, et al.*, (D.C. E.D.N.Y. 1970); *United States v. Warehouse and Distribution Workers' Union, Local 688, et al.*, No. 60 CR 42 (E.D. Mo. E.D. 1960); *United States v. The First National Bank of Cincinnati*, Crim. No. 9473 (S.D. Ohio E.D. 1971); *United States v. W. A. Boyle, et al.*, Crim. No. 346-71 (D.D.C. 1971).

It is the contention of this defendant that purposeful discrimination in the enforcement of this statute appears on the face of the record. Not one of the persons who accepted or received the alleged contributions or expenditures is indicted, nor has any presentment been made to the grand jury seeking such an indictment. To the best of our knowledge after investigation, not once in the long history of this statute or its predecessors has a single person who accepted or received prohibited political expenditures or contributions been prosecuted. Politicians are, in effect, as immune from prosecution under this statute as Members of Congress are immune for their words while on the congressional floors. In addition, the discrimination is intentional and purposeful. Obviously, by the allegations in the indictments themselves, the government has in its files evidence that would support prosecutions of individuals other than labor union officials.

The extent to which the government responsibility has been abdicated in this area of enforcement is harrendous. The void left by intentionally discriminatory enforcement of Section 610 is now being filled by private litigants. *Common Cause et al v. Democratic National Committee et al*, C.A. No. '61-71 (D. D.C. 1971). The suit charges:

Every president elected in recent times and his national political party have been the beneficiaries of contributions made in violation of the (federal) laws. No attorney general has prosecuted either the persons making such unlawful contributions or the persons or political entities soliciting them.

The court has ordered that fund raisers for the major national parties submit to discovery on their roles in violating federal campaign financing laws. See; Washington Evening Star, Aug. 24, 1971, at A-3.

From the time of the first Section 610 case to come before the Court this pattern of discrimination against labor union officers has prevailed. Not only have politicians been immune from prosecution, but the Court's attention is called to the fact that no reported case reveals a corporation officer or a bank officer being prosecuted for consenting to a contribution or expenditure in violation of this statute, that the government studiously ignores such violations and that of the five types of offenders who could be prosecuted under this statute, labor union officers, with two exceptions to be cited *infra*, are the only individuals who have ever been prosecuted. Even when a corporation is prosecuted, with one known exception, its officers are not. See, *e.g.*, *United States v. Lewis Food Supply*, 366 F.2d 710. (9th Cir. 1966). Moreover, in the case now pending against the amici curiae

there is the anomaly that the union, which is alleged to have been making the prohibited expenditures or contributions since 1943, has not been indicated. *United States v. W. A. Boyle, et al.*, Criminal No. 346-71 (D.D.C. 1971).

The discrimination is so systematic that it may as well be incorporated in and proclaimed by the statute itself. *Snowden v. Hughes*, 321 U.S. 1 (1943).

We believe that the only exceptions to this constitutionally repugnant discrimination are two: *United States v. First Western State Bank of Minot, North Dakota, et al.*, Crim. No. 575 (D.C.N.D. 1970); *United States v. Bernard J. Clougherty, et al.*, No. 37414 CD, (D.C. Cal. C.D. 1969). In each of those cases, at least one officer of the offending organization was indicted. But the number of Section 610 indictments against *individuals* in the labor union movement contrasted with Section 610 indictments against *individuals* in other classes is so utterly disparate as to be obvious from the few unreported cases cited herein and the list of reported cases. See, *e.g.*, Title 18 U.S.C. § 610 and cases cited therein.

Violations of Section 610 by corporate officers, as well as by politicians, is hardly an unknown occurrence. As recently stated by Senator Gravel on the floor of the United States Senate, "[I] can give . . . chapter and verse how corporations shell out money to executives and they turn around and give it to politicians." 117 CONG. REC. S. 13151 (daily ed. Aug. 4, 1971). Surely, the government will not deny that it knows of these violations and still fails to prosecute. The question is why do labor affiliated individuals suffer such vigorous enforcement of Section 610 while other known violators are ignored.

CONCLUSION

In conclusion it is respectfully submitted that the "contribution" provision of Title 18 U.S.C. § 610 is unconstitutional standing alone; moreover, the "contribution" provision is inseparable from the unconstitutional "expenditure" provision and both provisions must, therefore, fall. In addition, Congress never intended to prohibit, and the statute on its face does not prohibit, indirect contributions or expenditures. Finally, the Court is urged to recognize the unconstitutional discrimination in the enforcement of this statute and refuse to sanction convictions obtained against members of a class singled out for special prosecution.

Respectfully submitted,

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